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No. 82-341

IN THE

Supreme Court of the United States

October Term, 1982

NUECES COUNTY NAVIGATION DISTRICT NO. 1,
Petitioner,

vs.

INTERSTATE COMMERCE COMMISSION, ET AL.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Did the Interstate Commerce Commission err in vacating its previous orders issued in 1954 and 1961 which were based on the facts that existed at those times and which found that certain rates were unduly prejudicial to Corpus Christi, Texas?

2. Did the Interstate Commerce Commission err in vacating its 1954 and 1961 orders based on a new test of what constitutes control of joint rates?

3. Did the Interstate Commerce Commission err in adopting a policy of refusing to prescribe rates under 49 U.S.C. 10741(b) where no control existed under its new policy and no other provisions of the Interstate Commerce Act were violated?

4. Did the Interstate Commerce Commission, where it found no control by the origin carrier under its new policy, err in finding that there was no failure by the origin carrier to agree on how to divide the revenues produced by the proposed joint rates?

5. Did the Court of Appeals err in holding issues raised by three of the petitions before it for review were moot, and after so holding in refusing to remand the proceedings to the Interstate Commerce Commission with instructions to dismiss?

ALPHABETICAL LIST OF PARTIES

Bunge Corporation, intervenor in support of petitioner below not a party here.

Burlington Northern Railroad Company, as the successor in interest to the St. Louis-San Francisco Railway Company on November 21, 1980, intervenor in support of respondents below and respondent here.

Interstate Commerce Commission, respondent below and respondent here.

Louis Dreyfus Corporation, intervenor in support of petitioner below not a party here.

Missouri Pacific Railroad Company, special appearance below, respondent here.

Nueces County Navigation District No. 1, petitioner below and petitioner here.

Producers Grain Corporation, petitioner below not a party here.

Southern Pacific Transportation Company, The Atchison, Topeka and Santa Fe Railway Company, and Houston Port Bureau, Inc., intervenors in support of respondents below and respondents here.

United States of America, respondent below and respondent here.

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OPINION BELOW AND JURISDICTION

The petitioner has for the purposes of the petition for a writ of certiorari accurately set forth the opinions of the Interstate Commerce Commission and the Circuit Court of Appeals for the Fifth Circuit.

The petitioner has accurately set forth the basis of the jurisdiction of this Court.

STATUTORY PROVISIONS INVOLVED

The petitioner has accurately set forth in Appendix H of the Appendix which accompanied the petition for a writ of certiorari the particular statutory provisions involved.

STATEMENT OF THE CASE

The case before this Court involves three decisions of the Interstate Commerce Commission concerning the publication of reduced rates on wheat from ten origins in Oklahoma and two origins in Kansas to Galveston and Houston, Texas, but not to Corpus Christi, Texas, and one decision of the Commission vacating two earlier decisions of the Commission concerning Corpus Christi, Texas. The first three decisions will be referred to herein as the *Wheat* case and the fourth decision will be referred to herein as the *Corpus Christi* case.

By a tariff item scheduled to become effective on February 20, 1977, the St. Louis-San Francisco Railway Company (Frisco)[1] which served the origins and the Fort Worth and Denver Railway Company (FWD) and the Missouri-Kansas-Texas Railroad Company (MKT) which serve various Texas ports joined in the publication and filing with the Commission of reduced carload rates on wheat to Galveston and Houston, but not to Corpus Christi, at levels from one to three and one-half cents per 100 pounds below the former rates. The reduced rates were not at first published to Corpus Christi because the Missouri Pacific Railroad Company (MP) and the Southern Pacific Transportation Company (SP) (the rail carriers which reach Corpus Christi) refused to concur in reduced rates to that port.

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[1] The Frisco was merged into the Burlington Northern Railroad Company on November 21, 1980, but since the term "Frisco" was used throughout the case when it was before the Interstate Commerce Commission and in the brief filed in the Circuit Court of Appeals for the Fifth Circuit, that term will be used herein.

Verified complaints and requests for suspension alleging unlawfulness in violation of the Interstate Commerce Act[2] for failure to publish the same reduced rates to Corpus Christi were filed by Louis Dreyfus Corporation ("Dreyfus"), Nueces County Navigation District No. 1 ("Nueces"), and Producers Grain Corporation ("Producers"), hereinafter collectively referred to as the Corpus Christi interests. The Houston Port Bureau and the Frisco on its own behalf and on behalf of other railroads which were parties to the reduced rates filed replies to the verified complaints and requests for suspension. The Suspension and Fourth Section Board of the Commission concluded not to suspend the proposed rates but, by order dated February 16, 1977, it entered into an investigation thereof. Thus, the rates became effective as scheduled.[3] The proceeding was assigned by the Commission to be handled under a no-oral hearing procedure known as the modified procedure. The evidence of the Frisco on behalf of all carriers participating in the reduced rates was included in statements of fact and argument and in reply statements of fact and argument submitted in accordance with the rules applying to modified procedure. The Houston Port Bureau and Union Equity Co-Operative (which had intervened in support of the

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[2] The allegation was that the proposed rates were unduly prejudicial to Corpus Christi and unduly preferential to other Texas ports in violation of Section 3(1) of the Interstate Commerce Act (Act). The entire Act has been recodified without substantive change and now is set forth in 49 U.S.C. 10101, *et seq.* The term "unreasonable discrimination" is now used in lieu of the terms undue prejudice and undue preference. The recodified section concerning unreasonable discrimination is 49 U.S.C. 10741(b).

[3] Except for general rate increases which have since been applied and except for the fact that comparable rates have been published to Corpus Christi, basically no changes have occurred in the rates to the Texas ports in the 69 months since the reduced rates became effective.

reduced rates) filed opening statements in support of the Frisco.

On April 15, 1977, or about 45 days subsequent to the order directing that modified procedure be observed, Nueces filed a motion requesting the Commission to:

"1. Broaden the investigation to include the Missouri Pacific Railroad Company (MoPac) and the Southern Pacific Transportation Company (SP) as respondents;

2. Promptly set the proceeding for oral hearing in Washington, D.C.; and

3. Direct the Frisco, MoPac, and SP to have present at such oral hearing one, or more, competent witness to testify on direct and cross-examination exactly what efforts have been made to publish comparable reduced rates to Corpus Christi, Texas, and why those efforts have not been successful."

Frisco filed a reply to the motion in a pleading dated April 26, 1977. Opening statements of facts and argument were filed with the Commission by the Corpus Christi interests on April 27, 1977.

In a decision dated August 4, 1977, the Commission ordered:

"That this investigation be, and it is hereby, broadened into and concerning the lawfulness of the rates, charges, rules, regulations, and practices contained in schedules published by or for the accounts of the St. Louis-San Francisco Railway Company and its connections with Missouri Pacific Railroad Company and Southern Pacific Transportation Company and their movements of wheat for export, in carloads, from the issue origins to Corpus Christi, Texas."

"That this investigation be, and it is hereby, broadened with a view of making such findings and orders in the premise as the facts and circumstances shall warrant. In the event the said schedules are changed, amended or reissued, such change, amended or reissued schedules will be included in this investigation.

That the St. Louis-San Francisco Railway Company, Missouri Pacific Railroad Company, and the Southern Pacific Transportation Company may under modified procedure file statements of position and evidence on or before 10 days from service of this order. In view of the time constraints that govern this proceeding, reply statements are not contemplated."

In accordance with the last cited ordering paragraph above, Frisco filed a statement of position on August 22, 1977. On or about August 26, 1977, the Corpus Christi interests filed a petition seeking a right to file a reply statement—a right which was not accorded or contemplated by the Commission's August 4, 1977 decision.

In an order dated September 8, 1977, the Commission set forth comments with respect to the proceeding. In that order, the Commission said:

"In situations where one railroad serves one port directly and the other port by joint service with a second railroad, this Commission has stated that a carrier does not have common control if it offers to establish equivalent service at equivalent rates, but the connecting carrier declines. *Corn & Soybeans, Midwest to Gulf Ports*, 349 ICC 1, 4 (1974). Evidence in the present case indicates that the originating carrier requested concurrences from other carriers, some of which concurred while others did not. Accordingly, we are no longer satisfied that offers of

divisions by originating carriers are sufficient by themselves to demonstrate a willingness to provide equivalent service at equivalent rates, unless it is clearly and convincingly shown by the carriers that these efforts were made in good faith.

Without such a showing, the originating carrier may predicate the lower joint rate upon a division of revenues which substantially reduces the share of the connecting carrier or carriers. By so doing, the origin carrier could virtually compel the non-concurrence of the connecting carriers.

In order to establish that it has made good faith offers of divisions with the non-concurring railroads, respondent should submit evidence showing: (1) the amount and proportion of the offer of divisions in the case at issue; (2) the amount and proportion of the established basis of divisions, if any, on the particular commodity and over the particular route; and (3) the amount and proportion of the established basis of divisions on identical or comparable commodities over identical or comparable routes. Respondent may also submit any other evidence, including cost data, to support its case."

The above September 8, 1977 order of the Commission also established due dates for additional pleadings. SP filed an opening statement of facts and argument. Frisco filed a second opening statement of facts and argument and submitted the evidence as required by (1), (2), and (3) in the above quotation. The Corpus Christi interests also filed second opening statements to which Frisco replied.

In a decision *Wheat, Oklahoma, and Kansas to Texas Gulf Ports (First Wheat)*, dated December 19, 1977, 357 ICC 382

(1977), the entire Commission found the proposed rates not to be unduly prejudicial to Corpus Christi, not unduly preferential to other Texas ports or otherwise unlawful (Pet. App. B).[4] Various petitions for administrative review were filed by the petitioners with the Commission and after denials, an action was initiated in the Circuit Court of Appeals for the Fifth Circuit challenging the Commission's decision. SP and Frisco intervened as respondents in that action (78-1348).

Frisco did not originally file replies to the petitions for administrative review directed to the *First Wheat* decision which petitions were filed by the Corpus Christi interests with the Commission because, effective February 22, 1978, it was able, with the MP's concurrence, to publish the reduced rates to Corpus Christi and the matter of concern of the Corpus Christi interests became moot. Thereafter, the Frisco requested that the proceeding be discontinued, but reserved the right, in the event its request was denied, to file replies to the various petitions for administrative review. Thereafter, the Corpus Christi interests agreed that the proceeding be discontinued, but only if the decision of the Commission in *First Wheat* was vacated.

The matter remained dormant until an order, dated June 20, 1978, was released by the Commission. This order denied Frisco's request to discontinue, but did authorize replies to the petitions for administrative review. Frisco and SP both filed replies. Subsequent to receipt of the June 20, 1978 decision, the Corpus Christi interests filed a petition with the Commission seeking a limited further hearing and related relief, and Frisco and SP replied. In a second decision (*Second*

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[4] The reference is to an appendice found in a separate volume filed by petitioner. The specific appendix to which reference is made is cited as "Pet. App. ——".

Wheat) dated February 2, 1979, 359 ICC 542 (1979), (Pet. App. C), the Commission affirmed its December 19, 1977 decision in *First Wheat*. In the *Second Wheat* decision, the Commission thoroughly discussed *Nueces County Nav. District No. 1 v. Obilene & S. Ry. Co.*, 291 ICC 459 (1954) and *Nueces County Nav. Dist. No. 1 v. Atchison, Topeka & Santa Fe Railway Co.*, 315 ICC 155 (1961), (*Corpus Christi* cases) and how the control circumstance should be viewed with respect to the facts involved in the matter before it in the *Wheat* case. The Commission also announced that the "Corpus Christi cases will be reopened to determine whether these decisions are consistent with the action taken here." On or about April 4, 1979, the Corpus Christi interests instituted a second appeal in the Circuit Court of Appeals for the Fifth Circuit with respect to the Commission's *Second Wheat* decision (79-1816). Opening briefs were filed by various parties with the Circuit Court of Appeals for the Fifth Circuit in both 78-1348 and 79-1816.

Subsequent to the filing of the briefs with the Circuit Court, the Commission by a notice released on November 15, 1979, reopened the *Corpus Christi* cases and upon approval of the Circuit Court also reopened the *Wheat* proceeding (i.e., to reconsider the *First Wheat* and *Second Wheat* decisions) for further consideration. Comments were solicited by the Commission with respect to the *Corpus Christi* cases inviting particular comment as to whether the port equalization orders entered in the *Corpus Christi* cases should be modified. Comments were filed by many of the nation's railroads (including separate comments by the Burlington Northern Railroad Company and the Frisco), by port interests, and by shippers. In a decision dated July 21, 1980 which embraced the two *Corpus Christi* cases and the *Wheat* case (Pet. App. D), the Commis-

sion found that under a proper interpretation of the Interstate Commerce Act, actual control and not network control is the proper standard to establish common source of unreasonable discrimination under 49 U.S.C. 10741(b) and that the good faith test of an offer of divisions may be utilized to prove that no actual control existed. The Commission thus modified its earlier findings in the *Corpus Christi* cases. The July 21, 1980 decision of the Commission also affirmed its earlier decisions in *First Wheat* and *Second Wheat*.

The Corpus Christi interests filed (1) an appeal attacking the Commission's third decision in *Wheat*, and (2) an appeal attacking the Commission's action in the *Corpus Christi* cases in the Circuit Court of Appeals for the Fifth Circuit which appeals were docketed as 80-1842 and 80-1843, respectively. Requests for a stay of the Commission's July 21, 1980 decision pending review were denied by the Commission. A motion to consolidate all appeals was granted, and all four appeals (Nos. 78-1348, 79-1816, 80-1842 and 80-1843) were handled in one decision by the Circuit Court of Appeals for the Fifth Circuit (Pet. App. A). It is to the decision of the Circuit Court of Appeals for the Fifth Circuit that petitioner has directed its petition for a writ of certiorari to which the instant brief is in opposition.

SUMMARY OF ARGUMENT

The facts before the Commission in the *Wheat* case are vastly different than those before the Commission in the *Corpus Christi* cases. Frisco, in the reduced rate actions it took on wheat which lead to the decisions of the Commission in the *Wheat* case, simply was attempting to protect the traffic moving to Galveston and Houston from diversion to other carriers which diversion was not occurring on the wheat traf-

fic moving to Corpus Christi. Frisco by taking most of the reduction in the rates out of its share of the joint revenues acted in good faith and therefore did not actually control the rates. No disagreement as to divisions existed. Absent control unreasonable discrimination under 49 U.S.C. 10741(b) cannot be found and unless other sections of the Interstate Commerce Act are violated, the Commission cannot prescribe rates. It makes no difference whether the Court of Appeals dismissed the appeal in the *Wheat* case because of mootness or the Court of Appeals remanded the *Wheat* case to the Commission with directions to dismiss.

ARGUMENT

Since it was Frisco's rate actions which precipitated the controversy which resulted in the action which is now before this Court, Frisco's argument herein will concentrate on the rate consequences or lack thereof which result from the Commission's approval of those actions. It is understood that the United States and the Commission in their joint brief will set forth arguments and cite supporting decisions which review the presumption of the correctness of orders and decisions of the Commission, the scope of review, the adequate findings and substantial evidence rules and the assumed expertise of the Commission with respect to the complex matters at issue. In the interest of brevity, those arguments will not be repeated here. Those arguments are adopted without qualification by Frisco for the purposes of this brief in opposition to the petition for a writ of certiorari.

The earlier review of the history of the proceedings before the Commission, which led to the three decisions of the Commission in *Wheat* demonstrates that the Commission's han-

dling of the matter has been extensive and that the petitioner had every opportunity to demonstrate that Frisco's action would result in injury to interests at Corpus Christi. The evidence of Frisco in the *Wheat* case before the Commission is materially different than the evidence which was before the Commission in the 1954 and 1961 *Corpus Christi* proceedings. The principal differences between the *Wheat* case and the earlier *Corpus Christi* cases are that: (1) carrier competition to Galveston and Houston is now different than to Corpus Christi; (2) only twelve origins are involved in *Wheat* whereas hundreds of origins were involved in the earlier *Corpus Christi* cases; and (3) the distance to Corpus Christi from the involved origins is about 250 miles greater and accordingly the costs to Corpus Christi are higher than to Galveston and Houston. The petitioner, however, did nothing to demonstrate that such differences were not material and that rates higher to Corpus Christi than to Galveston and Houston were not permissible. It chose to ignore these important aspects of the case and instead placed its entire reliance on the previous actions of the Commission in the *Corpus Christi* cases.

Frisco was a relatively small (but profitable) midwestern rail carrier which simply recognized that it could not sit idly by and watch its traffic get away. It sought opportunities to meet competitive circumstances as they occurred rather than wait until its traffic has been diverted away before taking corrective steps. The matter considered by the Commission in *Wheat* is an example of the action that Frisco on occasion has been required to take in order to protect its traffic.

Frisco recognizing that it was being faced with competitive actions of others that conceivably could have resulted in the

wheat traffic in which it was participating in the movement to the ports of Galveston and Houston being diverted from it, offered to publish reduced rates which were designed to meet the competition caused by reductions in rates on wheat made by certain rail carriers and by regulated and exempt motor carriers to Galveston and Houston. Frisco's offer included a willingness to join in the publication of reduced rates which would be identical to all Texas ports, including Corpus Christi, even though the same competition did not exist at Corpus Christi as existed to Galveston and Houston and even though the distances and costs were greater to Corpus Christi than to Galveston and Houston. Concurrences came from FWD and MKT, rail carriers serving Galveston and Houston, but none came from the MP and SP which serve Corpus Christi.[5]

In its evidence before the Commission, the Corpus Christi interests either ignored or attempted to disparage by argument, the testimony of the Frisco concerning the competition it faced with respect to the involved traffic to Galveston and Houston. No witness took the position that Frisco's evidence was inaccurate. Neither did the Corpus Christi interests attempt to show that its disadvantages with respect to greater distances and higher costs for rail services were not items the railroads were entitled to take in consideration in the publication of rates.

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[5] Frisco continued to hold itself out to join with any rail carriers serving Texas ports in the publication of the identical rates as those involved in the proceeding before the Commission. MP extended its concurrence with respect to Corpus Christi, and the reduced rates to Corpus Christi became effective on February 22, 1978. Frisco assumed virtually all of the reduction in the rates from its share of the joint revenues, i.e., MP and SP were not requested to give up any significant amount of the revenues that they were receiving from the higher rates.

Petitioner has done no more in its petition for a writ of certiorari than what it did before the Commission. That is, it has done nothing but set forth arguments which are not supported by any facts. Petitioner raises four principal points as the reasons the petition for writ of certiorari should be granted. None of these points raise any adequate reason why this Court should take that action.

Petitioner's first point is that the decisions below conflict with decisions of this Court. This is error. The decisions of the Commission in the *Wheat* case and the modification of the Commission's earlier orders in the *Corpus Christi* cases were actions which are adequately supported by the facts of the case, by the Interstate Commerce Act, and by decisions of the Commission, of lower appellate courts and of this Court. The Commission simply found on the basis of the evidence before it that its former concept of control, which is a necessary element for it to find unjust discrimination under 49 U.S.C. 10741(b) (formerly undue preference and prejudice under 49 U.S.C. 3(1)), was not correct when the proponent carrier did not reach either the alleged preferred points or the alleged prejudiced points and when the proponent carrier treated its rail carrier connections that did reach the alleged preferred and prejudiced points with no difference.

As was stated earlier, only the Frisco reached the origins, the MKT and FWD reach Galveston and Houston, and the MP and SP reach Corpus Christi. It was also stated earlier that Frisco offered to absorb the rate reductions from what would be its share of the joint rates, and that MKT and the FWD agreed, but MP and SP did not. Therefore, substantially all of the reduced revenues came from the Frisco's share of the joint rates.

Thus, Frisco did all it could to maintain equal rates to all Texas ports. It simply did not have enough partners to cover all ports. It cannot be questioned that Frisco's willingness to take virtually all of the reduction in revenues from its share of the joint rates demonstrated that it was acting in good faith in its offer to its rail connections.

The competition which Frisco and the Galveston and Houston railroads faced was pervasive, and such competition had to be met with competitive rates, otherwise they would have foregone the opportunity to continue participating in any of the movement of the wheat traffic to those ports. If Frisco had taken no action to reduce the rail rates on wheat to Galveston and Houston because it could not get concurrences to publish the same reduced rates to Corpus Christi all of the wheat traffic would ultimately have gravitated to the motor carriers serving Galveston and Houston, and Corpus Christi could not possibly have gained from having equal but higher rail rates with Galveston and Houston. Galveston and Houston simply would have received its wheat movements by use of motor carriers, and Corpus Christi which does not have the same motor carrier competition from the involved origins would not have been benefitted. Corpus Christi has never even attempted to justify such an illogical position. It has sought equality of treatment without a demonstration that the competition, distance and cost were the same. Equality of treatment at the former higher rail rates Galveston and Houston *vis a vis* Corpus Christi would not have helped Corpus Christi, but would have substantially damaged Frisco.

Petitioner next asserts that it was incorrect for the Commission to have concluded that absent control of both the alleged preferred rate and the alleged prejudiced rate, a rate would not be prescribed unless there is some other violation

of the Interstate Commerce Act. The Commission's conclusion was not erroneous.

Over the period of the existence of unlawfulness based on undue preference and undue prejudice (now unreasonable discrimination) the Commission has required the showing of four elements, namely:[6]

1. That rate disparity existed between the alleged preferred points and the alleged prejudiced points,
2. That injury occurs to the alleged prejudiced points,
3. That a carrier or group of carriers controls the rates to both the alleged preferred points and the alleged prejudiced points, and
4. That different transportation conditions did not exist between the points to justify the difference in treatment.[7]

The control element is an essential ingredient to a finding of unlawfulness under 49 U.S.C. 10741(b). Absent a finding of control, unreasonable discrimination cannot exist, and if the assailed rates are to be found unlawful such result must be accomplished under sections of the Interstate Commerce Act other than 49 U.S.C. 10741(b). This is so fundamental that little comment is warranted. All crimes, and civil wrongs have their essential elements and a failure of the proof of a

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[6] See *Chicago Board of Trade v. Illinois Central R.R.*, 344 ICC 818, 840 (1973) aff'd sub nom, *Chicago, E.I.R.R. v. United States*, 384 F.Supp. 298 (N.D. Ill. 1974), and aff'd mem. 421 U.S. 956 (1975).

[7] Although the Commission could have found that the transportation conditions with respect to the movements to Galveston and Houston were different from those involving Corpus Christi because of competition existing to Galveston and Houston and less distance and lower cost to Galveston and Houston than to Corpus Christi, it did not do so. Instead, it based its findings on the lack of common control.

single element prevents a finding that the crime or civil wrong was committed. If the defendant is to be made to pay, it cannot be for the crime or civil wrong which was not proven, it must be for another crime or civil wrong that is proven. Thus petitioner having failed to prove a common control prevented the Commission from prescribing a rate under the unreasonable discrimination prohibition provisions of the Interstate Commerce Act. Accordingly, no prescription of rates can be accomplished by the Commission unless a violation of another section of the Interstate Commerce Act has occurred. The teachings of this Court in *State of New York v. United States*, 331 U.S. 284 (1947) and *Ayrshire Collieries Corporation v. United States*, 335 U.S. 573 (1948) make this abundantly clear. Thus, if no unreasonable discrimination exists, rates in order to be found unlawful must be found to be in violation of other sections of the Interstate Commerce Act. No parties opposing Frisco's action in the proceeding before the Commission raised any issues or submitted any evidence that could be considered in relation to any section of the Interstate Commerce Act except 49 U.S.C. 10741(b).

Petitioner next argues that the Commission permitted the reduced rates to be published to Corpus Christi because of a disagreement between the carriers as to the divisions of the joint rates. There is no evidence in the record to support that argument. The evidence in the records is directly contrary. The record is replete with evidence that Frisco agreed to take virtually the entire reduction in the rates from its divisions of the proposed joint rates to any Texas port. That is, Frisco connections would fare as well from a total revenue standpoint under the reduced rates as under the higher rates. There never has been a disagreement as to divisions. The proof of this fact is no reduction in revenues resulted to

FWD or MKT when they originaliy concurred in the reduced rates to Galveston and Houston and none resulted to MP when it ultimately concurred in the reduced rates to Corpus Christi.

The Commission's only concern with divisions in the instant matter was to determine whether Frisco made a good faith offer to its connections. The Commission found that based on Frisco's offer to take the reductions in the reduced rates from its share of the joint revenues that Frisco had made a good faith offer. In no manner (and properly so) did the Commission conclude that there was a controversy as to divisions and that such controversy justified the failure to publish the reduced rates to Corpus Christi.

The petitioner next argues that the Commission has reinterpreted the anti-discrimination provisions of the Act in its decisions in the *Wheat* case and the *Corpus Christi* cases, and that the Court of Appeals was wrong in approving the Commission's action. Again, petitioner is in error. The Act prohibits unreasonable discrimination and nothing the Commission or the Court of Appeals did has changed that. The wrong of unreasonable discrimination can always be proven if facts are introduced meeting the four previously discussed elements of that wrong. All the Commission did was to find that one carrier of a joint service does not control that joint service unless that carrier does not act in good faith in its dealings with the other participants in the joint services. Were the Frisco in the circumstances here challenged to have proposed reduced rates to the various Texas ports and agreed to reduce its divisions on the rates applicable to Galveston and Houston, but refused to reduce its divisions on the rates applicable to Corpus Christi where Frisco's services were

identical, conceivably Frisco would be charged with bad faith and, in effect, would be controlling the rates to Corpus Christi. However, that is the reverse of what actually occurred. Frisco agreed to treat all railroad connections alike. The petitioner is in error in saying that the Commission has changed its interpretation of the Act.

Petitioner's last point is that the Court of Appeals was in error in finding that the appeals in the *Wheat* case were moot, but if that court was correct in that regard, it should not have dismissed the petitions for review, but instead should have remanded the cases to the I.C.C. with directions to dismiss. It seems unbelievable that petitioner would raise a point which has no significance. It makes no difference whatsoever if the Court of Appeals had remanded with directions to dismiss or merely took direct action itself and dismissed the appeals. The same end is reached. The Court should not grant a petition for a writ of certiorari simply to direct the Court of Appeals to remand a matter to the Commission to dismiss as moot when that result would be no different than what the Court of Appeals itself accomplished by dismissing the appeals in the *Wheat* case as moot.

CONCLUSION

The petitioner has not set forth any valid reasons for this Court to grant the petition for a writ of certiorari. The petitioner has had almost six years to prove that the Frisco did not act in accordance with the anti-discrimination provisions of the Interstate Commerce Act in publishing the reduced rates involved in *Wheat*. It has not yet been able to have the Commission in its three decisions in the matter or the Court of Appeals in its two decisions (opinion and denial of motion for rehearing) agree with the positions it has advanced. Nor has the petitioner set forth any valid reasons why the Commission erred in utilizing the test of actual control rather than the previously utilized test of network control established in the *Corpus Christi* cases for one portion of the proof required to demonstrate unreasonable discrimination. This Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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